No. 92-94

In The

Supreme Court of the United States

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a Minor, by LARRY and SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the employment by a public school district of an individual to provide sign language interpreter services in the classrooms of a pervasively sectarian parochial high school violates the requirement of separation of church and state, as provided in the establishment clause of the First Amendment.

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Respondent Catalina Foothills School District No. 16 of Pima County, Arizona ("Respondent"), by and through its counsel of record, respectfully responds to Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (the "Petition"). For the reasons set out herein, Respondent respectfully requests that the Petition be denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Zobrest v. Catalina Foothills School District*, 963 F.2d 1190 (9th Cir. 1992). The decision of the United States District Court for the District of Arizona is not reported. Both decisions are reproduced in the Appendix to the Petition.

JURISDICTION

Respondent agrees that this Court has jurisdiction to consider the Petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees with Petitioners' listing of constitutional and statutory provisions involved in this matter, except that 34 C.F.R. § 76.532 also should be listed. The text of 34 C.F.R. § 76.532 is reproduced in Appendix E to the Petition.

STATEMENT OF THE CASE

Respondent is in general agreement with the facts set out in Petitioners' Statement of the Case, and believes that Petitioners' characterization and summary of the Court of Appeals opinion is reasonable and fair. However, Petitioners' Statement of the Case is incorrect in one

significant regard: Contrary to Petitioners' representations, Respondent does not admit that the Education of the Handicapped Act, 20 U.S.C. §§ 1400 *et seq.* ("EHA")[1] or its Arizona statutory counterpart, A.R.S. §§ 15-761 *et seq.* requires Respondent to provide a sign language interpreter for Petitioner in a private or parochial school.[2] A reversal of the Court of Appeals decision, therefore, will not dispose of this case.[3]

In addition, it may be beneficial to describe briefly the school attended by Petitioner. Salpointe Catholic High School is a private Roman Catholic educational institution for young men and women located in Tucson, Arizona and operated under the direction of the Carmelite

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[1] Respondent acknowledges Petitioners' note that the Education of the Handicapped Act recently was retitled as the Individuals with Disabilities Education Act. *See* Petition at p. i. For the sake of conformity, Respondent likewise will continue to use the former "EHA" terminology.

[2] Although, for the limited purpose of resolving Respondent's motion for summary judgment, Respondent indicated that it voluntarily would pay for a sign language interpreter in a nonsectarian private school, *see* Respondent's Answering Brief in the Court of Appeals at p. 6, n. 3, Respondent has never agreed that the EHA requires it to do so.

[3] The case was decided in the District Court on Respondent's motion for summary judgment, in which the determinative issue was whether the establishment clause prevented Respondent from providing the services of a sign language interpreter at a pervasively religious parochial school. Technically, it never has been necessary to address the issue of whether the EHA or state education statutes require Respondent to provide the requested services on private school grounds. However, should the decision of the Court of Appeals be reversed, these issues would remain to be adjudicated.

Order of the Roman Catholic Church (R.34).[4] The parties have stipulated that Salpointe is pervasively religious in character; its goal of educating students in a religious atmosphere constitutes an integral part of the religious mission of the Roman Catholic Church; the two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe; and, for the purpose of this case, the religious character of Salpointe is not limited in any material manner (R.34-37). It is into this atmosphere that Petitioners demanded that Respondent place a publicly paid employee to facilitate and assist both the religious and educational activities being pursued.

REASONS FOR DENYING THE PETITION

The Petition for a Writ of Certiorari should be denied because the issues raised by Petitioners have been settled in both this Court and the circuits, because the decision rendered in the Court of Appeals is consistent with precedents established by this Court, and because other grounds exist for the denial of the services requested in this case. Accordingly, there are no compelling reasons to grant review.

Rule 10.1, Rules of the Supreme Court, provides that a petition for a writ of certiorari will be granted "only when there are special and important reasons therefore."

[4] The designation "R.___" refers to page number(s) in the Excerpts of Record in the Court of Appeals.

Among the situations described in Rule 10.1 where certiorari may be appropriate are when there is a conflict among the circuits; when a decision departs from the accepted course of proceedings; when an important issue has not been settled by this Court; or when a decision conflicts with applicable decisions of this Court. None of these situations applies to the present case. To the contrary, this case presents issues that fall squarely within established precedents. In addition, even if Petitioners could reverse existing precedent, the case still would not be resolved completely in favor of Petitioners. This case therefore does not rise to the level of importance where consideration by this Court would be necessary or appropriate.

I. THERE IS NO DISPUTE AMONG COURTS THAT HAVE DECIDED THIS ISSUE.

The specific question of whether a school district legally may pay for the services of a sign language interpreter in a parochial school has been decided by Courts of Appeals in two circuits. In addition to the Ninth Circuit ruling in the present case, the Court of Appeals for the Fourth Circuit came to the same conclusion, and found that the establishment clause of the First Amendment to the United States Constitution prohibits a school district from placing a sign language interpreter in a parochial classroom. *See Goodall by Goodall v. Stafford County School Board*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 188 (1991). The Ninth and Fourth Circuit decisions are in complete accord. In addition, precisely the same issue presented in this case was

put before this Court by the Plaintiffs in *Goodall* in a petition for writ of certiorari. Certiorari was denied only ten months ago, on October 7, 1991.

There is no compelling or special reason at this time for this Court to consider an issue that has been consistently decided by lower courts, and which this Court very recently decided not to consider. The Petition should be denied.

II. THE DECISION BELOW IS CONSISTENT WITH APPLICABLE PRECEDENTS ESTABLISHED BY THIS COURT.

Certiorari should be denied in this case because Petitioners have failed to demonstrate that the Court of Appeals' ruling is in any manner inconsistent with applicable precedents established by this Court. To the contrary, this Court's precedents support and form the basis of the Court of Appeals' reasoning in the decision below. The individual arguments in the Petition lack merit for the following reasons:

A. Petitioners, highlighting a portion of the dissenting opinion in the Court of Appeals, argue that, to determine whether governmental action has a primary effect that advances or inhibits religion, a court must review the effect of the legislation as a whole, rather than any particular application of the legislation. Petition at p. 6. In other words, Petitioners conclude that, because the EHA as a whole clearly satisfies an establishment clause inquiry, then particular applications of the statute, such as the placement of a sign language interpreter in a parochial

classroom, likewise will satisfy the inquiry. Both Petitioners and the dissenting judge, however, apparently overlook the fact that this Court has specifically approved the review of particular applications of a statute, as well as a statutory scheme as a whole. *Bowen v. Kendrick*, 487 U.S. 589, 601-02 (1988) ("[A]n otherwise valid statute authorizing grants might be challenged on the grounds that the award of a grant in a particular case would be impermissible."). The Court of Appeals properly considered whether the application of the EHA in this case, as requested by Petitioners, would violate existing establishment clause principles.

B. Contrary to Petitioners' suggestion, the Court of Appeals did not improperly expand the "symbolic link" test found in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985). *See* Petition at pp. 10-11. In *Grand Rapids*, this Court found that public classes conducted on parochial school grounds had the impermissible effect of promoting religion because the governmental presence on school grounds provided a "crucial symbolic link between government and religion, thereby enlisting – at least in the eyes of impressionable youngsters – the powers of government to the support of the religious denomination operating the school." *Grand Rapids*, 473 U.S. at 385. This Court noted that government improperly promotes religion "when it fosters a close identification of its powers and responsibilities with those of any – or all – religious denominations." *Grand Rapids*, 473 U.S. at 389. The Court of Appeals did not improperly expand this analysis; rather, the Court of Appeals simply and correctly concluded that a prohibited symbolic link between government and religion exists when a publicly paid employee

is placed in a parochial classroom and is required to participate in religious as well as educational activities conducted there. If anything, the symbolic link is stronger in this case, since here the public employee actually participates in the religious activities. In contrast, in *Grand Rapids*, the publicly paid teachers pursued only secular teaching activities, with only a risk that religious statements might be made by one or more particular teachers.

The Court of Appeals' finding of an impermissible symbolic link between government and religion in this case likewise is consistent with this Court's recent ruling in *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649, 60 U.S.L.W. 4723 (1992). In *Lee*, this Court concluded that the establishment clause does not permit school officials to invite clergy to offer invocations and benedictions at official public school graduation ceremonies. Because the graduation prayer in *Lee* "bore the imprint of the state" *Lee*, ___ U.S. at ___, 60 U.S.L.W. at 4726, the appearance of a connection between religion and the state, and the possible effect of this connection upon the participants of the ceremony, made the practice unacceptable. If it is objectionable for government to inject a brief religious presence into a graduation ceremony, it is equally if not more objectionable for government to inject its official presence directly into the day to day conduct of a parochial classroom. Stated in another fashion, if this Court's precedents "do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students," *Lee*, ___ U.S. at ___, 60 U.S.L.W. at 4726, then this Court's precedents likewise do not permit a publicly paid employee to assist in the communication and recitation of those prayers.

C. The Court of Appeals decision is consistent with this Court's rulings in *Mueller v. Allen*, 463 U.S. 388 (1983). *Witters v. Washington Department of Services for the Blind*, 471 U.S. 481 (1986), *Bowen v. Kendrick*, 487 U.S. 589 (1988), and *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). *Mueller, supra,* which involved tax deductions for individuals who pay school tuition, including parochial school tuition, and *Witters, supra,* which involved a government grant for tuition provided to a blind student who chose to attend a religious school, do not mandate a different result in the present case. Neither *Mueller* nor *Witters* involved the placement of a public employee in a parochial classroom to communicate, participate in and otherwise facilitate religious teachings. Likewise, in *Bowen, supra,* the Court approved legislation funding grants to various organizations for services and research relating to premarital and adolescent sexual relations, but specifically remanded the matter to determine whether funds may be flowing improperly to religious institutions such as parochial schools. *Bowen*, 487 U.S. at 622. Finally, the Court of Appeals' decision is consistent with *Mergens, supra,* which involved meetings of religious groups on public school premises. While *Mergens* suggested that, in some cases, government may permit religious activities to occur on its grounds, it also noted that government may not participate in or facilitate those activities. *Mergens*, 496 U.S. at 251. The government conduct requested by Petitioners is much more than simple acquiescence in Petitioners' educational choices; rather, the government is asked specifically to facilitate and participate in Petitioners' religious

education. This Court's precedents cannot be stretched far enough to permit such conduct.

D. Not only is the Court of Appeals' decision consistent with Supreme Court precedents, its result is mandated by precedent. *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), hold that government may not provide instructional resources to parochial schools or to students who attend parochial schools when such resources, in the classroom, could be put to religious use. Instructional materials such as maps, charts, films and projectors, and recording and laboratory equipment, may not be supplied by governmental entities because these items potentially could be subverted to religious purposes and facilitate religious instruction. The provision of these resources was determined to have an impermissible primary effect of promoting religion. Applying the same considerations to the present case, it is apparent that the sign language interpreter not only could be used, but also would be used, to facilitate religious instruction as well as Petitioners' participation in religious activities. In this regard, the sign language interpreter fares no better than the tape recorder in *Meek* or the globe in *Wolman*, and is equally impermissible under the establishment clause. The issue presented by Petitioners, therefore, falls squarely within precedents already established by this Court in *Meek* and *Wolman*.

E. Existing precedents, including those set out in *Meek, supra* and *Wolman, supra*, need not be reexamined or reconsidered. The present case does not mandate a reevaluation of existing establishment clause principles for several reasons. First, this Court, in its very recent opinion in *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649, 60

U.S.L.W. 4723 (1992), specifically declined to reexamine the criteria and considerations established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Secondly, even if it may be appropriate to take a second look at *Lemon* principles, this is not the case in which to make such an examination. Under any analysis, the use of a publicly paid employee to facilitate religious teaching and conduct cannot be reconciled with the establishment clause. Finally, using this case as a vehicle to reconsider existing precedents may be a futile exercise because other, statutory grounds exist to uphold the Court of Appeals' decision. *See* Argument, Section III, below.

F. Petitioners' arguments concerning the exclusion of individuals from public welfare benefit programs based on their religion, *see* Petition at pp. 9-10, is unpersuasive. While the government generally may not inhibit religion, this prohibition does not require, or even permit, the government to support religion in the alternative. *Lee v. Weisman*, ___ U.S. ___, 60 U.S.L.W. at 4725 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the establishment clause.").

It should be noted that Petitioners misread the conclusions reached by this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), when Petitioners conclude summarily that compliance with the establishment clause may not form a compelling state interest that justifies alleged limitations on the free exercise of religion. *See* Petition at p. 10. *Smith* says no such thing. To the contrary, *Smith* held only that certain State action, specifically

the enforcement of religion-neutral criminal laws prohibiting the use of peyote, need not be justified by a compelling State interest, even if such laws have the effect of burdening a particular religious practice. *Smith* in no manner affects the validity of the Court of Appeals' conclusion that avoiding a violation of the establishment clause constitutes a compelling state interest that justifies any alleged burden on Petitioners' practice of their religion.

III. OTHER GROUNDS EXIST FOR THE DENIAL OF THE REQUESTED SERVICES IN A PAROCHIAL SCHOOL

Even if Petitioners prevail before this Court and win a ruling that the State's provision of sign language interpreter services in a parochial school does not violate the establishment clause, which should not be the case, Respondents still would not be required to provide the services in a parochial school setting. The EHA, through applicable regulations, requires Respondent to make certain special education services, termed "related services," available to each handicapped student living within its boundaries who decides to enroll in a private school. *See* 34 C.F.R. § 300.403(a); 34 C.F.R. § 300.452. Federal courts have consistently interpreted these provisions, however, to mean that, while a school district must make certain special education related services (including sign language interpreter services) *available*, these services need not be physically available on the campus of a private parochial school. *Goodall by Goodall v. Stafford County School Board*, 930 F.2d 363, 367 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 188 (1991); *McNair v. Cardimone*, 676

F. Supp. 1361 (S.D. Ohio 1987). Rather, it is enough that the special education related services are available to the student on the public school campus. *Id*. Such is the case with Petitioner, who was offered the free services of a sign language interpreter in any public high school in Tucson.

Moreover, 34 C.F.R. § 76.532, part of the Education Department General Administrative Regulations, specifically provides that a school district may not use federal special education monies to pay for worship, instruction or proselytization. 34 C.F.R. § 76.532 provides in part:

> (a) No state or subgrantee may use its grant or subgrant to pay for any of the following:
> (1) Religious worship, instruction or proselytization.

This regulation has been construed specifically to preclude the school district from paying for sign language interpreter services inside a parochial classroom. *Goodall by Goodall v. Stafford County School Board*, 930 F.2d 363, 369 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 188 (1991). The Supreme Court's adjudication of establishment clause issues presented by Petitioners, one way or another, very likely will have no significant impact on the ultimate resolution of this case.[5]

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[5] In the District Court, this case was adjudicated based on Respondent's motion for summary judgment filed solely on federal constitutional grounds. Any reversal would allow Respondent to proceed to trial in order to raise all additional arguments.

CONCLUSION

The presence of a publicly funded state employee in a parochial classroom, communicating, assisting and participating in religious discussions and other sectarian activities, cannot be reconciled with the constitutional requirement that government not participate in the religious education of parochial students. The Court of Appeals decision either is consistent with or falls squarely within applicable precedents established by this Court. The Court of Appeals decision also is in complete agreement with the Fourth Circuit's decision in *Goodall, supra*, which considered this identical issue. In addition, the Court of Appeals opinion is consistent with all applicable federal district court, Court of Appeals and Supreme Court decisions in the First Amendment area. Not a single reported decision would suggest a contrary result.

Given the large body of law governing the establishment of religion in parochial schools, as well as the ease with which this case falls within those principles, this case presents no compelling or important reason to review either the *Lemon* test in general or the Court of Appeals decision in particular. Finally, because EHA regulations concerning Petitioners' entitlement to the requested assistance have yet to be construed in his favor, and very likely would be construed against him, this Court's review of establishment clause issues would have little, if any, impact on the ultimate outcome of this case. For

these and the foregoing reasons, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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